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No. 99-1496

In the Supreme Court of the United States

Supreme Court, U.S.
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GIA KALYNA JANAKAKIS-KOSTUN, PETITIONER

v.

EMMANUEL JANAKAKIS

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF KENTUCKY

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

SETH P. WAXMAN
Solicitor General
Counsel of Record
DAVID W. OGDEN
Assistant Attorney General
EDWIN S. KNEEDLER
Deputy Solicitor General
EDWARD C. DUMONT
Assistant to the Solicitor General
MICHAEL JAY SINGER
Attorney
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

JAMES H. THESSIN
Acting Legal Adviser
CATHERINE W. BROWN
Assistant Legal Adviser
EMILY O'CONNOR
JOHN P. SCHNITKER
Attorney Advisers
Department of State
Washington, D.C 20520

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QUESTIONS PRESENTED

Article 13b of the Hague Convention on the Civil Aspects of International Child Abduction (the Convention) permits a court to deny a petition for return of an abducted child to the country of the child's habitual residence where "there is grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation." Petitioner seeks to present the following questions:

1. Whether a court considering application of the "grave risk" exception must exclude evidence of potential harm that does not include evidence of direct physical abuse of the child.

2. Whether a court may invoke the "grave risk" exception without finding that the country of habitual residence is unable or unwilling to protect the child from the threatened harm.

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BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is filed in response to the Court's invitation to the Solicitor General to express the views of the United States.

STATEMENT

1. Petitioner is a United States citizen who married respondent, a Greek citizen, in Greece in 1989. Their daughter Bronte was born in Chania, on the island of Crete, in October 1991. Pet. App. 2a, 21a-22a.[1]

In 1995, petitioner threatened to leave respondent and to take Bronte with her. In February 1996, respondent filed a criminal complaint charging petitioner with interfering with his custodial rights, and asked a civil court in Athens to award him temporary custody of Bronte. The Athens court scheduled a hearing on respondent's petition, and issued an interim order requiring that Bronte remain in Greece. Acting under that order, Greek authorities stopped peti-

[1] We relate the facts as they are presented in the opinions of the courts below.

tioner at the airport as she sought to leave the country, with Bronte, on February 27. The Athens court then held a hearing, awarded respondent temporary custody, and again ordered that Bronte remain in Greece pending a final custody determination. The criminal charges against petitioner were dropped. Pet. App. 2a-3a, 22a.

Petitioner and Bronte returned to live with respondent. In May 1996, however, petitioner took Bronte to a hotel where petitioner's father, George Kostun, was staying. Respondent retrieved Bronte from the hotel, and thereafter refused to let petitioner communicate with her. Pet. App. 3a, 22a-23a.

Petitioner then sought custody of Bronte by filing an action in a court in Chania. On June 28, 1996, the Chania court scheduled a hearing on the merits of that request for September 5, 1996, and granted petitioner temporary custody pending that hearing. The court noted that the Athens court's earlier order, requiring that Bronte remain in Greece, remained in effect. On July 1, respondent delivered Bronte to petitioner, in compliance with the Chania court's order. He also sought visitation and communication rights, which the Chania court granted on July 22. Respondent was not able to exercise those rights, however, because in late July or early August petitioner and her father, whose service in the United States Army had left him with a number of European contacts, smuggled Bronte out of Greece and, ultimately, to the United States. Pet. App. 3a-4a, 23a.

In the meantime, respondent had filed his own custody action in the Chania court on July 27, 1996. Respondent also attended the September 5 hearing that had previously been set to consider petitioner's request for custody. The court set a new date of January 16, 1997, to hear both custody cases together. At that hearing, the court awarded respondent sole custody of Bronte. Pet. App. 4a-5a, 24a.

2. In November 1996, respondent sought the assistance of the governmental authority responsible for the administration, in Greece, of the Hague Convention on the Civil Aspects of International Child Abduction (the Convention), T.J.A.S. No. 11,670. Pet. App. 5a. In March 1997, respondent located petitioner and filed this action in the Circuit Court of Hardin County, Kentucky, invoking the Convention and seeking an order requiring that Bronte be returned to Greece. *Ibid.*; see International Child Abduction Remedies Act (the Implementing Act), 42 U.S.C. 11603 (granting jurisdiction and establishing procedures for cases arising under the Convention).

After taking evidence, the court concluded that respondent had carried his burden of demonstrating that Bronte's "habitual residence" was Greece and that her removal by petitioner violated custodial rights that respondent had exercised under Greek law. Article 12 of the Convention therefore entitled respondent to an order of return unless petitioner could establish the applicability of an exception. Pet. App. 18a, 24a-31a; see 42 U.S.C. 11603(e) (allocating burdens of proof). In that regard, petitioner contended that returning Bronte to Greece would "expose the child to physical or psychological harm or otherwise place [her] in an intolerable situation," within the meaning of Article 13(b) of the Convention (reprinted at Pet. App. 57a)).[2]

In support of that argument, petitioner offered the opinion of a clinical psychologist that Bronte was suffering from post-traumatic stress syndrome, had probably been ne-

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[2] Petitioner also argued that "the way she was treated by the Greek police and court system" would make an order of return inconsistent with "the fundamental principles of the [United States] relating to the protection of human rights and fundamental freedoms." Convention Art. 20; see Pet. App. 34a-35a. Petitioner does not renew that argument in this Court, and we do not address it.

glected and subjected to sexual, physical and emotional abuse, and should not be returned to Greece. Pet. App. 31a. Petitioner also offered evidence intended to show that respondent was violent and unstable, including that his regular manner of punishing Bronte was to give her a "smack on the back"; that on one occasion he "went into a violent rage, destroyed items in the house, and pushed [petitioner] and Bronte to the floor"; that on one occasion, during a quarrel, he pulled petitioner's hair so violently that she was hospitalized with severe neck injuries; and that on one occasion, he tore up Bronte's passport. See *id.* at 11a-12a.

Having considered the evidence presented to it, the court assigned "no value" to the psychologist's opinion that Bronte had been abused, because it was "based solely on * * * self-serving statements" by petitioner, and not corroborated by testing or observation. Pet. App. 31a-32a. It found the doctor's opinion concerning traumatic stress similarly unsubstantiated and unpersuasive. *Id.* at 32a-33a. Indeed, the court observed that "the only extended period of stress [for Bronte] * * * proven by the evidence" involved her "surreptitious and harrowing removal * * * from Greece by [petitioner], and the vagabond journey to which [she] ha[d] been subjected thereafter, living here, there and everywhere, and being deprived of all contact with her father." *Id.* at 32a. Noting that petitioner's evidence was "more closely akin to that which might be relevant in a custody proceeding" than to the sort of evidence that would show the existence of a "grave risk of harm" if Bronte were returned to Greece, the court concluded that there was "absolutely no competent evidence * * * that Bronte ha[d] been abused or neglected by [respondent]," that she faced "certain danger in Greece," or that "the Greek Courts [would] not properly * * * decide the ultimate issue of custody, and protect Bronte's interests in so doing." *Id.* at 33a-34a. Accordingly,

the court held that petitioner had failed to demonstrate the applicability of the Article 13(b) exception, and it ordered petitioner to deliver Bronte to respondent for return to Greece. *Id.* at 36a.

Petitioner asked the circuit court to reconsider its decision or to stay its order pending appeal, but the court denied those motions on January 28, 1998. Pet. App. 37a-40a. The state court of appeals also refused to stay the order pending appeal. *Id.* at 41a, 43a. The Chief Justice of the Supreme Court of Kentucky stayed the order temporarily, *id.* at 42a-44a, but on May 14 the full court dissolved that stay and declined to review the court of appeals' refusal to grant a stay pending appeal. *Id.* at 45a. On June 18, 1998, Justice Stevens also denied petitioner's application for a stay. *Id.* at 46a. On June 29, 1998, petitioner delivered Bronte to respondent, who took her back to Greece. Pet. App. 5a; Pet. 7.

3. Petitioner's appeal nonetheless remained pending in the Kentucky Court of Appeals, which, on March 19, 1999, affirmed the circuit court's order of return. Pet. App. 1a-17a. In rejecting petitioner's argument that return should have been refused under Article 13(b), the court of appeals adopted, verbatim, the reasoning of the lower court. *Id.* at 12a-14a. The Supreme Court of Kentucky denied discretionary review. *Id.* at 47a.

DISCUSSION

Petitioner seeks to present two questions concerning the Hague Convention's "grave risk" exception: Whether a court evaluating a "grave risk" claim may consider evidence of potential harm that does not involve "direct physical abuse" of the child, and whether the court may find that a "grave risk" exists without first concluding that the child's home country is unable or unwilling to provide the child with adequate protection through its own legal processes. While those questions are potentially important, there is no need

for this Court to review them at the present time, and this case would not be a suitable vehicle for their consideration. Accordingly, the petition should be denied.

1. The Hague Convention, to which both the United States and Greece are parties, embodies an agreement that child-custody decisions should almost always be made by the legal system of the contracting State in which the child has habitually resided. That agreement rests on the premises that international abduction of a child in derogation of established custody rights usually harms the child; that one party to a custody dispute should not be allowed to obtain custody, or to change the rules or forum for the custody determination, by abducting the child to a different jurisdiction; and that "only concerted cooperation pursuant to an international agreement can effectively combat" and deter such abductions. 42 U.S.C. 11601(a); see also Convention, introductory declarations and Article 1.[3]

The Convention applies to any child under the age of 16 who is "wrongfully removed" from one contracting State to another. Convention Arts. 1(a), 4. Removal is "wrongful" if it is "in breach of rights of custody" enjoyed by another person "under the law of the State in which the child was habitually resident immediately before the removal." *Id.* Art. 3(a). Where, as here, an aggrieved party commences proceedings under the Convention within one year of the wrongful removal, authorities in the State where the child is found are generally bound to "order the return of the child forthwith." *Id.* Art. 12. While proceedings under the Con-

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[3] The English-language text of the Convention is reprinted at 51 Fed. Reg. 10,498-10,502 (1986), together with an analysis (the State Department Analysis) prepared by the Department of State and submitted to the Senate Committee on Foreign Relations in connection with the Senate's consideration of the Convention. See *id.* at 10,494, 10,503-10,516.

vention are pending, authorities in the requested State are not to decide custody issues on the merits; and any custody decision made by that State before the commencement of Convention proceedings, or that would be entitled to recognition in that State but for the Convention, "shall not be a ground for refusing to return a child under th[e] Convention." *Id.* Arts. 16-17. Likewise, any decision made concerning return under the Convention "shall not be taken to be a determination on the merits of any custody issue." *Id.* Arts. 16-17, 19.

The Convention recognizes a few permissible (not mandatory) exceptions to the rule of return, including the one at issue in this case: The requested State is not bound to order the return of a child if the person opposing return establishes that "there is a grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation." Convention Art. 13(b).[4] Article 13 provides that in determining the applicability of that exception, "the judicial and administrative authorities [of the requested State] shall take into account the information relating to the social background of

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[4] The remaining exceptions apply where the person whose custody rights the removal violated was not actually exercising those rights; where that person consented to, or later acquiesced in, the removal; where the child objects to being returned and "has attained an age and degree of maturity at which it is appropriate to take account of [his or her] views"; and where return "would not be permitted by the fundamental principles of the requested State relating to the protection of human rights and fundamental freedoms." Convention Arts. 13, 20. If proceedings are commenced more than one year after the removal, the requested State may also decline to order return if "it is demonstrated that the child is now settled in [his or her] new environment." *Id.* Art. 12.

the child provided by the Central Authority or other competent authority of the child's habitual residence."[5]

In the Implementing Act, 42 U.S.C. 11601 *et seq.*, Congress established procedures for requesting return of an abducted child from the United States, authorizing both state and federal courts to hear petitions for return and to decide them "in accordance with the Convention." 42 U.S.C. 11603(d). Children determined to have been wrongfully removed are to be "promptly returned," unless the party opposing return establishes the applicability of one of the Convention's "narrow exceptions." 42 U.S.C. 11601(a)(4), 11603(e)(2). With respect to the "grave risk" exception under Article 13(b), the Act specifies not only that the party opposing return bears the burden of persuasion, but also that the exception must be established by "clear and convincing evidence." 42 U.S.C. 11603(e)(2)(A).[6] The Act also confirms that "[t]he Convention and [the Act] empower courts in the United States to determine only rights under the Convention[,] * * * not the merits of any underlying child custody claims." 42 U.S.C. 11601(b)(4).

2. Petitioner argues that the Kentucky courts applied the "grave risk" exception too narrowly in this case, by

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[5] Each State designates a Central Authority to discharge various duties imposed by the Convention. Convention Art. 6. Under the Implementing Act, the President has designated the Office of Children's Issues in the State Department's Bureau of Consular Affairs as the Central Authority for the United States. See 42 U.S.C. 11606(a); 22 C.F.R. 94.2. That Office has engaged the National Center for Missing and Exploited Children to process applications for the return of abducted children.

[6] The Act requires "clear and convincing" proof to invoke either the "grave risk" exception under Article 13(b) or the "fundamental principles" exception under Article 20. 42 U.S.C. 11603(e)(2)(A). The remaining exceptions allowed by Articles 12 and 13 (see note 4, *supra*) may be established by a preponderance of the evidence. 42 U.S.C. 11603(e)(2)(B).

limiting their consideration of potential harm to evidence of likely "direct physical or sexual abuse" of Bronte (Pet. 11; see Pet. 10-15), and by taking some account of the likelihood that appropriate Greek authorities could provide whatever protection might be necessary under their own child-custody and domestic-relations procedures (see Pet. 15-17). We see no error in the state courts' application of Article 13(b).

a. The limited power to refuse return under Article 13(b) must be construed in light of the Convention's central premises that custody disputes should be resolved in the State of the child's habitual residence, and that the incentive to abduct children may be sharply reduced by enforcement of an agreement among States to abide by that norm. See pp. 6-7, *supra*; Elisa Pérez-Vera, *Explanatory Report* ¶ 19, *reprinted in* 3 *Acts and Documents of the Fourteenth Session on Child Abduction* (Permanent Bur. of the Hague Conf. on Private Int'l Law ed. (1982)) (Explanatory Report) ("[T]he Convention rests implicitly upon the principle that any debate on the merits of * * * custody rights, should take place before the competent authorities in the State where the child has its habitual residence prior to its removal."); see also *id.* ¶¶ 11-18.[7] The Implementing Act reiterates the principle that courts in the United States considering a petition for return are "to determine only rights under the Convention and not the merits of any underlying child custody claims." 42 U.S.C. 11601(b)(4).

Article 13(b) and the Implementing Act do plainly authorize courts in this country to undertake some inquiry into the

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[7] Elisa Pérez-Vera served as official reporter for the Convention. The Explanatory Report is recognized by the Hague Conference on Private International Law, and by the Department of State, as "the official history and commentary on the Convention and * * * a source of background on the meaning of the provisions of the Convention." State Department Analysis, 51 Fed. Reg. at 10,503; see also, *e.g.*, *Blondin* v. *Dubois*, 189 F.3d 240, 246 n.5 (2d Cir. 1999).

conditions that will face an abducted child if he or she is sent home under the Convention. See *Nunez-Escudero* v. *Tice-Menley*, 58 F.3d 374, 377-378 (8th Cir. 1995); *Tahan* v. *Duquette*, 613 A.2d 486, 489 (N.J. Super. Ct. App. Div. 1992); *Explanatory Report* ¶ 117 (noting that information provided by home-country authorities under the third paragraph of Article 13, which calls for the provision of information "relating to the social background of the child," may be "particularly valuable" in determining "the existence of those circumstance which underlie the exceptions [to return] contained in the first two paragraphs"). Proof that return would actually place a child back in the physical custody of a parent who has abused the child in the past is one example of a proper ground for invoking the exception provided by that Article. See State Department Analysis § III(I)(2)(c), 51 Fed. Reg. at 10,510; but see note 11, *infra*; see also *Friedrich* v. *Friedrich*, 78 F.3d 1060, 1069 (6th Cir. 1996) ("grave risk" might be established by showing that return would expose child to "imminent danger" from war, famine, or disease, without regard to outcome of custody dispute). In principle, moreover, we agree with petitioner (see Pet. 11-13) that the evidence she adduced "indicating that [respondent] had a violent temperament with * * * [a] history of[] abusing his wife" (Pet. 9; see Pet. 5-6) was potentially relevant to establishing a "grave risk" of "physical or psychological harm" harm to Bronte (Convention Art. 13(b)), and that it would have been error if the state trial court had excluded or refused to consider that evidence.[8]

Nonetheless, the arguments typically raised by abducting parties in opposing return often bear a strong resemblance to the sorts of contentions concerning parental fitness and the best interests of the child that are frequently at the

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[8] As we explain below, the state courts did not refuse to consider petitioner's evidence in this case. See pp. 12-13, *infra*.

heart of child custody disputes. Courts hearing Convention proceedings must therefore exercise restraint in applying Article 13(b), lest the "grave risk" exception swallow the rule that States who join the Convention will respect each other's respective legal processes for determining custody. As Pérez-Vera explains:

> [T]he Convention as a whole rests upon the unanimous rejection of this phenomenon of illegal child removals and upon the conviction that the best way to combat them at the international level is to refuse to grant them legal recognition. The practical application of this principle requires that the signatory States be convinced that they belong, despite their differences, to the same legal community within which the authorities of each State acknowledge that the authorities of one of them—those of the child's habitual residence—are in principle best placed to decide upon questions of custody and access. As a result, a systematic invocation of the [Convention] exceptions, substituting the forum chosen by the abductor for that of the child's residence, would lead to collapse of the whole structure of the Convention by depriving it of the spirit of mutual confidence which is its inspiration.

Explanatory Report ¶34; see also *id.* ¶116 ("Each of the terms used in [Article 13(b)] is the result of a fragile compromise reached during" Convention negotiations); 42 U.S.C. 11601(a)(4) (exceptions to mandatory return are "narrow"), 11603(e)(2)(A) (requiring "clear and convincing evidence" to invoke "grave risk" exception); State Department Analysis § III(I)(2)(c), 51 Fed. Reg. at 10,510 ("grave risk" provision "was not intended to be used * * * to litigate (or relitigate) the child's best interests"); *Walsh* v. *Walsh*, Nos. 99-1747, 99-1878, 2000 WL 1015863, at *10 (1st Cir. July 25, 2000) (quoting *Explanatory Report* ¶ 34); *Blondin* v. *Dubois*, 189

F.3d 240, 246 (2d Cir. 1999); *Friedrich*, 78 F.3d at 1067; *Nunez-Escudero*, 58 F.3d at 376; *Rydder* v. *Rydder*, 49 F.3d 369, 372 (8th Cir. 1995).[9]

b. Petitioner argues (Pet. 9) that the Kentucky courts improperly "ignored" or "dismissed" evidence that respondent has a "violent temperament" and had abused petitioner. The decisions below, however, indicate that the courts received and considered petitioner's evidence, but ultimately gave it little credence, and found it insufficient to demonstrate the sort of "grave risk" of harm to Bronte that would authorize a court in the United States to depart from the Convention's rule of return. See Pet. App. 11a-14a.

As the court of appeals recognized (Pet. App. 12a), the trial court specifically discredited the proffered opinion of petitioner's psychologist that Bronte had been abused in the past and would be exposed to harm if returned to Greece. *Id.* at 31a-33a. Similarly, the courts did not refuse to consider petitioner's claims that respondent had mistreated her and Bronte. See *id.* at 11a-12a, 33a-34a; see also *id.* at 39a (observing, in rejecting motion for reconsideration, that "[t]o the extent that evidence was presented which in the eyes of the presenter was contrary to the Court's findings, it may be assumed that said evidence was considered and rejected as having probative value"). Rather, both courts concluded that petitioner's evidence "[did] not establish that Bronte face[d] a grave risk of harm if she [were] returned to Greece," and could instead be presented to the Greek courts as part of the ordinary custody proceeding that petitioner

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[9] Caution is particularly appropriate because allegations of abuse, while they must of course be taken very seriously, are often easy to make and difficult to refute (particularly in a distant forum). They therefore offer one obvious way for an abducting parent to "attempt to stave off [a] return order[] in the name of the child's welfare." Linda Silberman, *Hague International Child Abduction Convention: A Progress Report*, 57 Law & Contemp. Probs. 209, 267 (Summer 1994).

had improperly pretermitted by smuggling Bronte out of Greece. *Id.* at 12a-14a, 33a-34a. Particularly in light of the "clear and convincing evidence" standard imposed by the Implementing Act on "grave risk" claims under Article 13(b) (see 42 U.S.C. 11603(e)(2)(A)), there is no reason to question that conclusion.

Petitioner also argues (Pet. 13-15) that the state courts applied too demanding a standard of proof in this case, because they observed (Pet. App. 13a, 34a) that there was "no competent evidence * * * that Bronte faces certain danger in Greece." Read in context, the courts' phrase "certain danger" probably either refers to the sort of general, unavoidable risk of physical harm that might face a child who was returned to "a zone of war, famine, or disease," rather than to the chance that Bronte might be harmed by being returned to respondent's custody, or else is simply a way of stating that the evidence in this case does not satisfy the *Friedrich* test just articulated by the court. See *id.* at 13a, 33a-34a (quoting *Friedrich*, 78 F.3d at 1069). In any event, it is not inconsistent with the Convention's "grave risk" standard. The phrase "certain danger" does not, as petitioner suggests (see Pet. 13-14), imply that harm will actually occur. "Danger" is a synonym for "risk," and one can be "in danger" and yet escape unharmed. In that sense, a requirement that "danger" (or "risk") be "certain" would be met *more easily* than the Convention's actual requirement that "risk" not only exist, but also be "grave." Cf. State Department Analysis III(I)(2)(c), 51 Fed. Reg. at 10,510 ("The person opposing the child's return must show that the risk to the child is grave, not merely serious."). There is, however, no reason to believe that the courts' phrase, used in passing, was intended to alter or circumscribe the "grave risk" standard itself.

c. Finally, petitioner contends (Pet. 15-17) that the state courts erred by taking into account, in their Article 13(b)

analysis, the presumptive competence of the Greek courts to assess and protect Bronte's interests in resolving the question of custody. See Pet. App. 13a-14a, 34a. It is questionable whether deference to the Greek courts' ability to protect Bronte made a difference in this case, because the Kentucky courts were not persuaded that respondent had abused or neglected his daughter, or that she would be mistreated if returned to his care. See *id.* at 12a-14a, 34a. Even if the courts had given petitioner's evidence on that score greater credence, however, it would have been appropriate for them to look to their Greek counterparts to "adequately decide the ultimate issue of custody, and protect Bronte's interests in so doing." *Id.* at 34a.

The Convention aims to prevent child abductions by discouraging potential abductors' hopes of escaping from, or finding a more favorable forum for, custody disputes that should be resolved through ordinary legal processes in the jurisdictions where they first arise. See pp. 7-8, 11-12, *supra.* Thus, the Convention itself reflects agreement by each signatory State "that the authorities of one of them—those of the child's habitual residence—are in principle best placed to decide upon questions of custody and access." *Explanatory Report* ¶ 34. That agreement presupposes that the authorities in each State are ordinarily able to manage and resolve a custody dispute in a manner that is fully consistent with what the Convention recognizes is the "paramount importance" of protecting the personal safety and other interests of the child. See Convention, introductory declarations; see also Art. 7(h) (duties of the Central Authorities established under the Convention include "provid[ing] such administrative arrangements as may be necessary and appropriate to secure the safe return of the child"). That is the basis on which we expect our treaty partners to act when they are asked to order the return of a child who has been abducted from the United

States. When the situation is reversed, our own courts must be willing to do the same. See *Blondin*, 189 F.3d at 248-249; *Friedrich*, 78 F.3d at 1068.

As the courts below recognized, there may occasionally be cases in which it appears that authorities in the child's home jurisdiction are "incapable or unwilling to give the child adequate protection." Pet. App. 13a, 34a (quoting *Friedrich*, 78 F.3d at 1069). A court is free, under Article 13(b) and the Implementing Act, to consider a claim to that effect, and to refuse an order of return where "clear and convincing evidence" demonstrates that home-country authorities cannot or will not act appropriately to protect a returned child. 42 U.S.C. 11603(e)(2)(A); see *Blondin*, 189 F.3d at 250.[10] See, *e.g.*, *Walsh*, *supra*, 2000 WL 1015863, at *14-*15 (invoking Article 13(b) where father in Ireland was very violent and had disobeyed court orders in United States and Ireland, and court concludes that even a potential barring order would not be sufficient to protect children from grave risk). Ordinarily, however, courts in the United States should look to authorities in the child's home country to protect the child and to make other appropriate decisions concerning custody.[11]

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[10] Article 13(b) provides specifically for the consideration of "information relating to the social background of the child provided by the Central Authority or other competent authority of the child's habitual residence." See also *Explanatory Report* ¶ 117 (that information provision seeks in part "to compensate for the burden of proof placed on the person who opposes the return of the child"). The duties of Central Authorities also include "provid[ing] information of a general character as to the law of their State in connection with the application of the Convention." Convention Art. 7(e).

[11] The same principle qualifies the statement in the State Department Analysis, 51 Fed. Reg. at 10,510, that a court could appropriately deny return if a child was abducted "to safeguard it against further victimization" by a sexually abusive parent. That example assumes that the child would be returned to the physical custody of a parent who is in fact

3. The need to balance the Convention's general rule of return and its limited exception for situations of "grave risk," see pp. 9-12, *supra*, means that decisions in individual cases will often turn on particular factual circumstances. Appellate decisions applying the "grave risk" exception do not, however, presently reveal any conflict on matters of legal principle of the sort that would warrant review by this Court.[12]

Petitioner argues (Pet. 10-13) that the "grave risk" test articulated by the Sixth Circuit in *Friedrich*, 78 F.3d at 1069, and applied by the Kentucky courts in this case, Pet. App. 12a-14a, excludes consideration of harm that might be inflicted on a child by relatively indirect means—in this case, allegedly, by forcing the child to live in an environment of spousal abuse. That argument misreads *Friedrich*, which states that potential abuse must be "serious" in order to invoke the "grave risk" exception, see 78 F.3d at 1069, but nowhere suggests that evidence of a generally abusive home environment could not demonstrate the grave risk of "physical or psychological harm" contemplated by Article 13(b). Nor does anything in *Friedrich* conflict with decisions like *Tahan* v. *Duquette* and *Nunez-Escudero* v. *Tice-Menley*,

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abusive. In an actual case, a court should not ordinarily deny return to the country of habitual residence unless there is reason to believe that authorities in that jurisdiction have failed or would fail to respond appropriately to allegations of abuse. That rule best serves the Convention's central goal of discouraging international child abductions.

[12] Petitioner cites a number of decisions by district courts or state courts of first instance. It is true that the emphasis on prompt return in the Convention (Arts. 1(a), 11) and the Implementing Act (42 U.S.C. 11601(a)(4)) may lead to many cases being finally resolved by courts of first instance. The judgments of such courts are not, however, precedential, and their legal analysis is subject to later revision or disapproval by appellate courts. Any errors in or conflicts with or among existing trial-level decisions provide no basis for review by this Court at the present time.

which acknowledge the need for "some evaluation of the people and circumstances awaiting [the] child in the country of his habitual residence," *Nunez-Escudero*, 58 F.3d at 378, but also properly emphasize that the inquiry must be narrowly focused on potential serious harm to the child, and should not extend to "[p]sychological profiles, detailed evaluations of parental fitness, evidence concerning lifestyle and the nature and quality of relationships," or other evidence that "bear[s] upon the ultimate issue" of who should be granted custody, *Tahan*, 613 A.2d at 489. See *Nunez-Escudero*, 58 F.3d at 377-378 (evidence of abuse was overly "general," "concern[ed] the problems between Tice-Menley, her husband and [her] father-in-law" rather than any problems between the father or grandfather and the child, and hence was "irrelevant to the Article 13b inquiry"); see also *Blondin*, 189 F.3d at 246-247 (endorsing finding that children faced risk of physical abuse based in part on evidence of previous abuse of mother, but also citing both *Friedrich* and *Nunez-Escudero* for the proposition that the "grave risk" exception must be narrowly construed).[13]

Petitioner cites (Pet. 16) the statement in *Nunez-Escudero*, 58 F.3d at 377, that "Article 13b requires more than a cursory evaluation of the home jurisdiction's civil stability and the availability there of a tribunal to hear the custody complaint." That case does not, however, conflict with the recognition by the courts below, and in *Friedrich* and *Blondin*, that a child generally will not face a "grave

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[13] One state appellate case cited by petitioner, *In re Coffield*, 644 N.E.2d 662, 665 (Ohio Ct. App. 1994), adopts the unduly narrow rule that a "grave risk" may be found "only when the general environment of the home country poses a risk, not [when the risk involves] the specific environment in which the child will live." That erroneous view has not, however, been reviewed or adopted by the Ohio Supreme Court, or revisited in light of later cases in this developing area, such as *Nunez-Escudero*, *Friedrich* and *Blondin*.

risk" of harm when returned under the Convention, because the legal system of the home jurisdiction will normally provide appropriate protection. See Pet. 15-17. In the statement petitioner cites, the *Nunez-Escudero* court sought only to make clear that the existence of a custody tribunal and other protection mechanisms was not the *only* relevant inquiry. 53 F.3d. at 377-378. Nothing in the decisions below, or in *Friedrich* or *Blondin*, is inconsistent with that position. Rather, the decisions uniformly recognize that a court considering a "grave risk" claim under Article 13(b) must consider all available evidence concerning the situation that will actually face a particular child upon return, including *both* "the people and circumstances awaiting that child in [his or her] country," *Nunez-Escudero*, 58 F.3d at 378, *and* how those "people and circumstances" might be affected, provisionally or permanently, by "any ameliorative measures (by the parents and by the authorities of the state having jurisdiction over the question of custody) that can reduce whatever risk might *otherwise* be associated with a child's repatriation," *Blondin*, 189 F.3d at 248 (emphasis added).[14]

4. Even if there were conflict among the lower courts on the questions petitioner seeks to present, this case would not be an appropriate vehicle for this Court's consideration of those issues. First, as we have noted (see pp. 12-13, *supra*), the state courts in this case did not exclude or refuse to consider any of the evidence proffered by petitioner, and yet they were not persuaded that petitioner's daughter would

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[14] Petitioner seeks to rely (Pet. 16) on the decision of the district court on remand in *Blondin*. See *Blondin* v. *Dubois*, 78 F. Supp. 2d 283 (S.D.N.Y. 2000), appeal pending, No. 00-6066 (2d Cir.) (argument scheduled for September 12, 2000). That decision is not, of course, authoritative. See note 12, *supra*. Indeed, the United States has filed an amicus curiae brief with the Second Circuit supporting reversal of the district court's decision. We have provided copies of that brief to the parties in this case, and we have lodged a copy with the Clerk of this Court.

face *any* substantial risk of harm if she were returned to Greece, presumptively in the custody of respondent. Thus, it is not clear that either of the legal questions presented by the petition was material to the state courts' resolution of this case.

Second, because petitioner did not succeed in securing a stay pending appeal, Bronte Janakakis was delivered into respondent's custody and returned to Greece in June 1998. She has apparently been living in Greece, and subject to the plenary custody jurisdiction of the Greek courts, since that time. Pet. App. 5a. Although the Kentucky Court of Appeals proceeded to decide this case on appeal, and although the parties make no mention of the issue, the case appears to be effectively moot. In any event, nothing in the Convention would require courts or other authorities in Greece to give binding effect to any judgment of this Court purporting to reverse or vacate an order of return that has already been fully executed, and it is at best uncertain what other legal or practical effects, if any, might attend such a judgment. That uncertainty counsels strongly against granting review in this case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

SETH P. WAXMAN
Solicitor General
DAVID W. OGDEN
Assistant Attorney General
EDWIN S. KNEEDLER
Deputy Solicitor General
EDWARD C. DUMONT
Assistant to the Solicitor General
MICHAEL JAY SINGER
Attorney

JAMES H. THESSIN
Acting Legal Adviser
CATHERINE W. BROWN
Assistant Legal Adviser
EMILY O'CONNOR
JOHN P. SCHNITKER
Attorney Advisers

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